The Wackenhut Corporation *and* Mary Orr. Case 14-CA-16187

21 October 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 13 April 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was conducted in St. Louis, Missouri, on complaint issued October 13, 1982, alleging a single 8(a)(1) violation: the July 20, 1982 discharge of security guard Mary Orr for giving testimony at an Illinois Department of Labor hearing on a wage claim filed by a former fellow guard, without her first requesting a subpoena as required by company rule. The complaint does not allege and, at the pretrial conference, the General Counsel asserted that the General Counsel does not contend that the company rule is unlawful.

Upon the entire record, including my observations of witness demeanor, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is an employer subject to the Act.

II. UNFAIR LABOR PRACTICE

The facts: The relevant facts are simple and, except as noted, uncontroverted.

The Respondent provides security guard services at a customer's plant in Illinois. The Charging Party and others were interviewed for guard positions in December 1981 and January 1982. The Charging Party previously had been employed by the Respondent as a guard at another location. At the time of their interview, the applicants were told that the hourly rate would be $3.35 or $3.50, depending on the outcome of contract negotiations with the customer; at the time of hire, the guards were told that the rate would be $3.35 plus an 8-cent hourly uniform cleaning allowance. After her initial employ as a guard, the Charging Party was promoted to sergeant, directing the night shift of security guards. She was not a supervisor under the Act.

In late May 1982 a wage claim was filed with the Illinois Department of Labor by Joseph Harris, a former guard at the plant. His claim: he had been told during the December and January interviews that the hourly rate would be $3.50. Prior to this time, the Respondent had received no similar claim from any other guard hired at the same time and there is nothing in this record to indicate that the Respondent should have been aware of employee discussions of any such claim. Harris and the Charging Party both testified at this hearing that they often discussed the wage problem with other guards, but not with any supervisor.

The hearing on Harris' individual wage claim of $104 was scheduled before a state hearing officer on July 20, 1982. Harris requested aid from several current and former guards, including the Charging Party. Two days before the hearing, the Charging Party was reminded by Supervisor Lt. Brookmyer of the company rule and was told she could attend as an observer, but could testify only if she were subpoened. The rule referred to by Brookmyer is a companywide rule included in its guard handbook:

> 4.3.4. A security guard has no authority in a civil case and if required to testify in any civil case relating to his/her duties, the security guard should report the facts to the supervisor of the force and demand a subpoena.

Not only was the Charging Party specifically reminded of the rule by Brookmyer, she also reread the rule before the hearing and was aware that she could be discharged or disciplined for violating it.

The July 20 hearing was attended by the claimant Harris (a former guard), guards Art Shirley and Charging Party Mary Orr (who was off duty at the time), and former guard Matt Orr. All but Shirley gave testimony; he attended merely as an observer. Prior to the receipt of any testimony, the hearing officer asked whether the attendees were present as witnesses. Shirley replied that he was present only as an observer and that he would need a subpoena if he were to testify. Charging Party Orr stated that she intended to give testimony and was asked by the hearing officer if she wanted a subpoena. She replied that she would testify without one. When asked by the hearing officer if the matter were of sufficient importance to jeopardize her job, she responded, "yes." She testified without a subpoena and later that evening was given a written notice of termination, which gave as the reason for the discharge her having given testimony without a subpoena in violation of section 4.3.4 of the guard manual. When told of the decision, the Charging Party replied, "I figured as much."

Shirley was not discharged or disciplined for attending the hearing and the Charging Party would not have been

discharged or disciplined had she accepted a subpoena from the hearing officer.

Harris' wage claim was denied. The Charging Party's claim for unemployment compensation was denied by decision of an Illinois Department of Labor referee on September 27, 1982, which found specifically that she

> . . . was discharged after she disobeyed a direct order and violated a known company rule. The claimant testified at a civil hearing without benefit of a subpoena required by employer rules. The claimant could have received a subpoena but did not do so. The claimant was aware of the rule and directly defied the supervisor.

There is no evidence in this record of a disparate enforcement of the rule, no evidence of other protected activity on the part of the Charging Party, and no suggestion of any other motive on the Respondent's part for the discharge. Moreover, the complaint does not allege and, at the pretrial conference, the General Counsel stated he did not contend that the "demand-a-subpoena" company rule, either as written or as applied, is violative of the Act.

Based solely on my observation of her demeanor on the witness stand, I was unpersuaded by the Charging Party's testimony that the hearing officer made the subpoena offer only *after* she had testified. On the other hand, Supervisor Nash's testimony was clear, consistent, and convincing. Furthermore, the Charging Party's testimony appears less than complete, with nothing in it to suggest why an experienced guard with actual knowledge of company rules would risk discharge by not accepting an offer of a subpoena. Nor can I credit the testimony of Harris which might suggest company knowledge of his wage claim prior to his voluntary quit in May 1982. He admitted not discussing the wage dispute with management "except in brief to Nash." Based on my observation of his demeanor on the stand, I have little confidence that he was reliably reporting events as they actually occurred.

Discussion: Two issues are presented: whether the Charging Party was engaged in protected concerted activity in attending a hearing and testifying on behalf of a former employee who was prosecuting a wage claim against the Respondent, and whether she was discharged for engaging in that activity. Because I find and conclude that the latter issue must be answered in the negative, there is no need to consider the former.

At the outset, it is useful, I believe, to restate what is not at issue:

> —there is no contention that Company rule 4.3.4 prohibits attendence or testimony at trials or hearings. General Counsel concedes that the rule "does not deny an employee the right to appear and testify in a civil proceeding, rather it only requests that the employee demand a subpoena." [G.C. Br., p. 6.]
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> —it is uncontroverted that the reference to "civil case" in the company rule is given a broad lay meaning by the company and is intended to apply to all non-criminal proceedings, whether they be civil or equitable proceedings in a state or federal court or administrative proceedings before a state or federal agency.
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> —it is uncontroverted that the rule has been uniformly applied. General Counsel has offered no evidence of disparate enforcement in cases where testimony was given without "demanding" or asking for a subpoena, despite the fact that the rule is applicable to all guards employed by this nationwide company. Only one other employee was present at the hearing and he was there only as an observer. The rule did not apply to him for that reason and he was not disciplined.
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> —there is no contention by General Counsel that the rule is invalid, despite its broad application to all non-criminal proceedings, to employee activity during both working and nonworking hours and to employees who are prosecuting claims as well as to employees who are merely giving testimony. Indeed, at the prehearing conference, counsel for General Counsel asserted unequivocally that General Counsel does not contend that the company rule is invalid.
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> —it is uncontroverted that neither charging party nor any other employee was prohibited from, or in any other way interfered with, attending and testifying at the hearing. Nor is it suggested or contended that Respondent inquired into or attempted to influence the testimony of charging party.
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> —the credible evidence is that a subpoena was proferred to charging party by the hearing officer prior to her testimony. Admittedly, she refused it with knowledge that she exposed herself to discipline for violation of the rule.
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> —there is no allegation or suggestion that Respondent was motivated in its discharge of charging party by union animus, charging party's apparent support of the former employee's wage claim or any other activity on her part. Indeed, it is conceded that the sole and exclusive motive for the discharge of charging party was her refusal to accept the proferred subpoena, in the presence of her supervisors and in violation of a known company rule;
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> —it is uncontroverted that charging party would not have been discharged or disciplined had she asked for a subpoena or accepted the one proffered to her at the hearing.

Relying in his posthearing brief on the well-established rule that a company rule which has the effect of interfering with, restraining, or coercing employees in their Section 7 rights will only be lawful if it advances a substantial and legitimate company interest, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the General Counsel contends that the rule in this case has such a restraining effect and that there are no legitimate business interests to support such a restriction.

The General Counsel's posthearing position is a troubling one, since it conflicts with his prehearing represen-

tation that he does not contend that the company rule is unlawful. Then, he disclaimed a contention of unlawfulness; now, he seeks a finding of unlawfulness based on the "effect" of the rule and the absence of "legitimate business interests to support it." There is no need here to consider the binding effect of a party's prehearing representation.

As a matter of fact, the rule does not restrict employee participation or testimony at a wage claim hearing. It imposes but one requirement relevant to this case—that the employee "demand a subpoena." It does not prohibit attendance; it does not prohibit testimony if the subpoena request is denied; and it does not constrict the scope of employee testimony. It simply insists that security guards request a subpoena before testifying in noncriminal proceedings. There is no suggestion in this record that the security guards in fact considered this a restriction on attendance and testimony. Indeed, another employee attended the hearing without incident and, admittedly, there was no effort or intent on the Respondent's part to stifle the Charging Party's participation in that wage claim hearing.

Moreover, as a matter of law, the rule does not have the *effect* of restricting employee attendance or testimony. The requirement on the part of the guards ("I request a subpoena") is a minimal one and, it should be noted, the use of subpoenas in the case of worker witnesses is commonplace in all litigation and administrative proceedings. Where, as here, the employees work as security guards in the law enforcement field, it cannot be inferred that they would be intimidated in the exercise of Section 7 rights by a requirement of this kind.

Even if viewed as presumptively unlawful, the rule is not an unreasonable one given the fact that the Respondent's employees are security guards and must maintain an air of neutrality in a wide variety of proceedings, including, but certainly not limited to, tort claims by third persons against the Respondent and/or the Respondent's client; employment discrimination claims by employees of the client against the client; and proceedings before the Board itself involving employees of the client and the client. It would be difficult, if not impossible, to draft a rule which would categorize the many kinds of legal proceedings in which security guards might be involved as a witness and to determine in advance which of these demands a neutral posture on the part of the Respondent and its guards. Under the circumstances, it is not unreasonable to impose the minimal requirement of a subpoena request in all cases.

Of particular interest in this regard is *Standard Packaging Corp.*, 140 NLRB 628, 630 (1963). There, the Board found lawful an employer's discharge of employees who left their jobs, without subpoena, to attend a decertification hearing.

> [W]e cannot find that Respondent's refusal to release Storms and Murray was *motivated* by any desire to interfere with the Board's processes or with such rights as the complainants may have had to attend the Board proceeding as prospective witnesses. . . . And we are persuaded that the subsequent disciplinary action taken. . . . was not in reprisal for any protected activity on their part, but was *motivated* solely by the complainants' absence from the plant in disregard of orders. [Emphasis added.]

Pursuant to Section 10(c), I conclude that, on its face and as applied, the rule is lawful and that the discharge of the Charging Party was motivated solely and exclusively by her wilfull disregard of that rule and was not, in whole or in part, a reprisal for her attendance and testimony at the wage claim hearing and, accordingly, issue the following

ORDER[1]

It is ordered that the complaint be dismissed.

[1] If no exceptions are filed pursuant to Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be deemed waived for all purposes.